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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1965

NO. 684

SID RICHARDSON CARBON & GASOLINE CO.,
Petitioner,

v.

THE MOORE COMPANY OF SIKESTON,
MISSOURI, AND J. E. MOORE, JR.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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COMMERCIAL RECORDER, FORT WORTH, TEXAS—10-5-65—60

INDEX

Page

BRIEF

Petition for a Writ of Certiorari 1

Opinions Below 2

Jurisdiction 2

Questions Presented 2

Statutes and Rules Involved 4

Statement of the Case 5

How Federal Question is Presented 6

Reasons for Granting Writ 7

Argument Amplifying Reasons Relied on for Allowance of the Writ 7

Conclusion 14

APPENDIX

A. Memorandum Opinion and Order of the United States District Court, Eastern District of Missouri, Southeastern Division 16

B. Opinion and Order of the United States Court of Appeals for the Eighth Circuit 21

Order of the United States Court of Appeals for the Eighth Circuit Overruling Petitioner's Petition for a Rehearing 34

CITATIONS

Cases:	Page
Bates Manufacturing Company v. United States, 303 U.S. 567	8
Burnett v. New York Central R. R. Co., 380 U.S. 424	4,30
Dill v. Scuka (E.D. Pa., 1961), 198 F. Supp. 808, 811	10
Fistel v. Christman (D.C. W.D. Pa., 1952) 13 F.R.D. 245	9
Gluss v. Brooklyn Eastern District Terminal Co., 359 U.S. 231	4
Goldlawr v. Heiman (1962), 369 U.S. 463	4,17,29
Herb v. Pitcairn, 325 U.S. 77	4,8
Hixon v. Highsmith (D.C. Tenn., 1957), 147 F. Supp. 801	9,18,28
Hoffman v. Wair (D.C. Oregon, 1961), 193 F. Supp. 727, 733	9
Hukill v. Pacific and Arctic Railway and Navigation Co., (D.C. Alaska, 1958) 159 F. Supp. 571	9,28
International Pulp Equipment Co. v. St. Regis Kraft Co., (D.C. Del., 1944) 55 F. Supp. 860	28
L. G. Defelice & Son, Inc. v. Globe Indemnity Company, (D.C. N.Y., 1959), 23 F.R.D. 275	10
Linn & Lane Timber Co. v. U. S., 236 U.S. 574	3,11,27
Link v. Wabash R. Co., 370 U.S. 626	13
Messenger v. United States (CA 2, 1956), 231 F. 2d 328	10,12,25
Mohler v. Miller (CA 6, 1956), 235 F. 2d 153	10,28
Rollins v. United States (CA 9, 1961), 286 F. 2d 761	10,26
Ryerson v. United States, 312 U.S. 405	13
Schram v. Holmes (D.C. Mich., 1943) 4 F.R.D. 119	9

CITATIONS—(Continued)

	Page
Waggoner v. New York, Ontario & Western Railway (M.D. Penn., 1956), 146 F. Supp. 926	10
West v. Cincinnati, N. O. & T. P. Ry. Co., (D.C. Tenn., 1952), 108 F. Supp. 276	10
Yudin v. Carroll (D.C. Ark., 1944) 57 F. Supp. 793	9
Statutes:	
15 U.S.C. § 15b	4,9,22
28 U.S.C. Rule 3 F.R.C.P.	5
28 U.S.C. Rule 4(a) F.R.C.P.	5
28 U.S.C. Rule 41(b) F.R.C.P.	5,13
Miscellaneous:	
1 Barron & Holtzoff, Federal Practice & Procedure § 163, pp. 639, 641	10,27
54 C.J.S. "Limitation of Actions", § 266, p. 298-299	10
3 Cyc of Federal Procedure § 10.12, p. 292	10
6 Toulmin's Anti Trust Laws § 5.9, pp. 194-195	10
Original Committee Note to Rule 3, Advisory Committee on Rules	26

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

To the Honorable Chief Justice and
the Associate Justices of the
Supreme Court of the United States:

Petitioner, Sid Richardson Carbon & Gasoline Co., prays that a Writ of Certiorari issue to review the order and judgment of the United States Court of

Appeals for the Eighth Circuit entered in that Court in the above entitled case, reversing the judgment of the United States District Court for the Eastern District of Missouri, Southeastern Division, sitting at Cape Girardeau, Missouri.

OPINIONS BELOW

The opinion of the Court of Appeals, reported in 347 F. 2d 921, is attached hereto as Appendix B. The memorandum opinion and order of the District Court, reported in 237 F. Supp. 817 is attached hereto as Appendix A.

JURISDICTION

The judgment of the United States Court of Appeals for the Eighth Circuit sought to be reviewed was dated and entered on the 13th day of July, 1965. Petitioner's Petition for Rehearing was denied by Order dated and entered August 12, 1965.

Jurisdiction to review said judgment by Writ of Certiorari is believed to be conferred on the Supreme Court by the provisions of Title 28, U. S. Code, Section 1254(1).

QUESTIONS PRESENTED

The question presented is whether a federal statute of limitation is tolled by mere filing of the complaint,

without diligence on the part of the plaintiffs to obtain service and prosecute their claim.

This problem has vexed the lower Federal Courts, litigants and their counsel since the adoption of the Federal Rules of Civil Procedure in 1938. It is stated succinctly by the Advisory Committee on Rules in note 4 to Rule 3, quoted by the Court of Appeals below, 347 F. 2d 923.

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule *whether the mere filing of the complaint stops the running of the statute, or whether any further step is required*, such as, service of the summons and complaint or their delivery to the marshal for service." (Emphasis added)

Prior to the adoption of the Rules, extant case law established that filing the complaint, together with reasonable diligence in securing service of process, were necessary to toll limitation statutes. *Linn & Lane Timber Company vs. United States*, 236 U.S. 574.

Since the adoption of the Rules, this Court has not written on the question except in dicta. Inferior federal courts have differed, and the goal of uniformity in federal procedure is threatened in the absence of a decision by this Court.

The District Court below held that the limitation period set by Congress was not extended by filing the complaint alone, where plaintiffs were not diligent in obtaining service.

Despite the fact that records relating to the alleged cause of action, and important to petitioner's defense were destroyed during the period of delay in service of process, the Court of Appeals found automatic tolling and held that diligence "is not in the case."

While in *Burnett vs. New York Cent. R. R. Co.*, 380 U.S. 424; *Goldlawr vs. Heiman*, 369 U.S. 463; *Gluss vs. Brooklyn Eastern District Terminal*, 359 U.S. 231; *Herb vs. Pitcairn*, 325 U.S. 77, and other cases, this Court has relieved diligent plaintiffs from the impact of an inflexible interpretation of the statutes of limitation; the Court has not passed on the basic conflict which relates to protection of innocent defendants from culpable plaintiffs.

A decision is urgently needed that the intention of this Court in promulgating Rule 3 did not include the abrogation of the established principle that statutes of limitation are tolled by filing of a complaint *only when coupled with reasonable diligence in securing service of process.*

STATUTES AND RULES INVOLVED

The first sentence of Title 15 U.S.C. § 15b provides:

"Any action to enforce any cause of action under sections 15 or 15a of this title shall be for-

ever barred unless commenced within four years after the cause of action accrued."

28 U.S.C. Rule 3 F.R.C.P. provides:

"A civil action is commenced by filing a complaint with the court."

28 U.S.C. Rule 4(a) F.R.C.P. provides:

"Summons: Issuance. Upon the filing of the complaint the clerk shall forthwith issue a summons and deliver it for service to the marshal or to a person specially appointed to serve it. Upon request of the plaintiff separate or additional summons shall issue against any defendants."

28 U.S.C. Rule 41(b) F.R.C.P. provides:

"For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him."

STATEMENT OF THE CASE

This private action for treble damages under the Robinson-Patman Act was filed October 23, 1961. Summons was issued, and service was obtained on the same day, but it was quashed on May 12, 1962.

Until September 24, 1963, when respondents filed a motion to vacate a prior dismissal for want of prosecution, no effort was made to obtain issuance or service of alias summons. Records in respondents' possession and pertinent to petitioner's defense were destroyed by water in the interim. Alias summons was issued and served in January 1964.

After reinstatement of the case, summary judgment was granted petitioner on the grounds that the action was barred by limitations because respondents' failure to use diligence in obtaining service precluded tolling of the statute. The Court of Appeals for the Eighth Circuit took the view that once the complaint was filed, diligence in obtaining service was unnecessary.

How A Federal Question Is Presented.

The complaint was filed under the Robinson-Patman Act (15 U.S.C. § 15), and the defense urged by petitioner is based upon the statute of limitation therein contained, 15 U.S.C. § 15b.

Petitioner submits that the sole question which is necessary to the decision of this case is the correct interpretation of federal statutes of limitation, and 15 U.S.C. § 15b in particular, in the light of Rules 3 and 4 of the Federal Rules of Civil Procedure.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals in the instant case was based upon a narrow and mechanistic interpretation of Rule 3, wholly foreign to principles of justice.

Granted, arguendo, that a case is "commenced" by the filing of the complaint alone, it does not necessarily follow that such commencement is sufficient to toll the statute of limitation nor to preclude the existence of a correlative equitable rule that prohibits tolling by dilitory action.

It is important for this Court to inform bench and bar if, like other rules, Rule 3 is to be interpreted as to confer its benefits only upon those who act reasonably and with diligence, or, in the alternative, that Rule 3 is to be applied strictly and without regard to its effect upon the rights of the parties.

This is a matter of outstanding general importance due to confusion which has arisen from the lack of uniformity of decision in the inferior federal courts in applying statutes of limitation to analogous cases.

Although the Court of Appeals stated,

> "Section 15b was enacted subsequent to the adoption of the Rules. Thus, with knowledge that Rule 3 required only the filing of a com-

plaint to commence an action, had Congress desired any additional steps to be taken they would have enumerated them."

Such an assumption of Congressional intent is ill founded, since prior to 1955 when Section 15b was enacted, but after promulgation of Rule 3, this Court had expressly left open the question of necessity of such "additional steps".

In *Bates Manufacturing Company v. United States*, 303 U.S. 567, complaint had been filed shortly before expiration of the period of limitations. Promptly after the expiration of the period, service was effected. This Court reversed a dismissal, but expressly refused to consider what would have been the effect had there been lack of diligence in obtaining service.

Again the problem was left open by this Court in *Herb v. Pitcairn*, 325 U.S. 77, 79, in language cited with approval in *Burnett*, supra.

> "*Whether the action would be barred if state law made new or supplemental process necessary is a question not involved here and not decided.* Clearly however, when process has been adequate to bring in the parties and to start the case on a course of judicial handling which may lead to final judgment *without issuance of new initial process*, it is enough to commence the action within the Federal statute." (Emphasis added).

It should follow that where the issuance of new initial process is necessary, the action has not been "commenced" so as to toll the statute.

A number of Courts have so interpreted Rule 3, in the light of equity. *Hoffman v. Wair*, 193 F. Supp. 727, 733 (D.C. Oregon, 1961); *Hixon v. Highsmith*, 147 F. Supp. 801 (E.D. Tenn., 1957); *Hukill v. Pacific and Arctic Railway and Navigation Co.*, 159 F. Supp. 571 (D.C. Alaska 1958); *Fistel v. Christman*, 13 F.R.D. 245, (D.C. W.D. Pa., 1952); *Yudin v. Carroll*, 57 F. Supp. 793, 798 (D.C. Ark. 1944); *Schram v. Holmes*, 4 F.R.D. 119, (D.C. Mich. 1943).

The decision by the Court of Appeals in the instant case is a mere exercise in semantics which ignores the raison d'etre of the rule quoted in *Burnett v. New York Central R. R.*, supra, and in *Herb v. Pitcairn*, supra.

The requirements for "commencing" an FELA action within the meaning of 45 U.S.C. § 56 [substantially identical in terminology to 15 U.S.C. § 15(b)], including "a bona fide effort to prosecute the claim" are pointed out in *Burnett* and *Herb v. Pitcairn*.

In each case this Court limits relief to a diligent plaintiff in a case where process has been adequate. The Court of Appeals has misinterpreted the policy of this Court as an abrogation of the rule of diligence. Petitioner believes that these cases merely state a policy of fair play for litigants.

Rollins v. United States, 286 F. 2d 761, (9 Cir., 1961) also rejects the theory that a bona fide effort is necessary to tolling of the statute of limitations.

Messenger v. United States, 231 F. 2d 328 (2 Cir., 1956), upon which the Court of Appeals relied in its decision below, supports, in its language, the harsh rule of automatic extension of the statutory period by mere filing of a complaint, but the decision was tempered because dismissal of the complaint under Rule 41b was sustained.

The confusion now extant with reference to the question involved in this case is evidenced in numerous other decisions which recognize the problem. Dicta in favor of requiring reasonable diligence is found in *Mohler v. Miller*, 235 F. 2d 153 (6 Cir., 1956); *Dill v. Scuka*, 198 F. Supp. 808, 811 (E.D. Pa. 1961); *L. G. Defelice & Son, Inc. v. Globe Indemnity Company*, 23 F.R.D. 275 (D.C. N.Y. 1959); *Waggoner v. New York, Ontario & Western Railway*, 146 F. Supp. 926 (M.D. Penn. 1956); and *West v. Cincinnatti, N. O. & T. P. Ry. Co.*, 108 F. Supp. 276, (D.C. Tenn. 1952), and other cases.

The leading texts also are in disagreement with the Court of Appeals below. 3 Cyc. of Federal Procedure § 10.12, p. 292; 6 Toulmin's Anti Trust Laws § 5.9, pp. 194-195; 1 Barron & Holtzoff, Federal Practice & Procedure, § 163, p. 639; and 54 C.J.S. "Limitation of Actions", § 266, pp. 298-299.

Petitioner contends that there is nothing in the provisions or history of the Rules of Procedure or the Robinson-Patman Act which indicates the abandonment of the salutary rule, previously established by this Court, that statutes of limitation are tolled by filing of a complaint only when coupled with a bona fide effort to prosecute the claim. *Linn & Lane Timber Company vs. United States*, supra, 236 U.S. 574, 578.

A contrary interpretation of Rule 3, is unsupported by reason and defeats the intention of Congress by enlarging the limitations period without more action on the part of plaintiff than "dropping his complaint in the Clerk's office".

Our Federal Courts have frequently recognized that the statutes of limitation can be harsh in their effect and have softened the impact on innocent plaintiffs by tolling the statute where war, fraud practiced on the plaintiff, or other circumstances have caused a bona fide effort to prosecute a claim to be defeated by some technicality.

Failure to enforce a statute of limitation because of a technicality can have an equally unfair impact upon innocent defendants.

In deciding this important and recurring question for the benefit of litigants throughout the United States, this Court needs to look no further than the

maxim that no man may take advantage of his own wrong. It is inconsistent with this fundamental principle of jurisprudence to permit a litigant to obtain the advantage of an extension of the statutes of limitation through his own inaction in failing to have alias summons issued.

The *Burnett* case, supra, points out that:

> "Statutes of limitations are primarily designed to assure fairness to defendants. Such statutes promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared."

The destruction of respondents' records important to petitioners' defense makes this case fall exactly within this rule!

In *Messenger v. United States*, supra, 231 F. 2d 328, 333, upon which the Eighth Circuit relied in its opinion below, it is suggested in the concurring opinion that alias summons may issue "to relieve a diligent plaintiff from the negligence or oversight of a marshal". He goes on to point out in this case "I think the plaintiff was chargeable with knowledge that the Rule had not been complied with and that due diligence required plaintiff to move for the issue of fresh process with reasonable promptitude after the filing of the marshal's return".

The language is equally applicable to this case. The holding by the Court of Appeals that, in the face of failure to exercise such diligence, the statute of limitations is tolled, is contrary to the spirit of fair play for litigants.

Contrary to the statement by the Court of Appeals, the issue of diligence is material to this case. The District Court was justified in dismissing the complaint either upon the limitations plea of petitioner or under Rule 41(b), upon its finding of lack of diligence.

In its opinion, the Court of Appeals refers to the adequacy of Rule 41(b) to protect against unreasonable delay, and alludes to the absence of a Rule 41(b) motion.

No motion under Rule 41(b) is necessary to the dismissal of a complaint for want of diligence in prosecution. *Link v. Wabash R. Co.*, 370 U.S. 626, 629-630. The District Court had the power to dismiss sua sponte.

In the instant case, the determination by the District Court of want of diligence supports the dismissal of the complaint under the familiar principle that the decision of a trial court should be affirmed if it can be sustained on any grounds, even though it purports to be rendered on a ground which the appellate court finds insufficient. *Ryerson v. United States*, 312 U.S. 405.

CONCLUSION

Our federal courts have evidenced their high sense of justice in granting relief to an *innocent* plaintiff who has been prevented from filing his suit in a timely manner because of war, fraud, or misrepresentation or whose choice of forum has, in light of subsequent events, proved erroneous.

In this case the District Court has found plaintiffs not innocent, but dilatory.

A fundamental purpose of the statutes of limitation is to protect potential defendants from suit on stale claims and the attendant problems of investigation, location of witnesses, and compilation of other evidence. Petitioner has been confronted with a loss of material records, in respondents' possession, which occurred during the period after the statute of limitation had run. If the single act of respondents in filing their complaint automatically extended this period for more than two years, petitioner is without recourse.

It is a small price to require of a plaintiff that he be diligent in obtaining service of process in order that the statute of limitation be tolled. It is too great a burden on defendants to permit the extension of limitation periods beyond that established by Congress by filing of a complaint and nothing more.

The strained and unnatural construction placed upon Rule 3 by the Court of Appeals below is not supported by any interpretation by this Court. It is contrary to this Court's decisions predating the Rules of Civil Procedure, and it is contrary to the spirit of those decisions handed down subsequent to adoption of the Rules.

For the benefit of litigants throughout the United States, this Court should declare that Rule 3 does not require tolling of a limitations statute where filing of a complaint is not coupled with diligence in obtaining service. The decision of the United States Court of Appeals for the Eighth Circuit should be reversed.

Respectfully submitted,

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APPENDIX A

MEMORANDUM OPINION AND ORDER

(Filed October 30, 1964)

This matter is pending before this Court on defendant's motion for summary judgment on the plaintiff's private suit for treble damages under the Robinson-Patman Act and the Clayton Act.

The defendant's motion for summary judgment is based upon three grounds:

1. The statute of limitations bars plaintiffs' claims;

2. The record shows that there was no injury to competition upon which plaintiffs' cause of action could be based;

3. The claim of plaintiff, The Moore Company of Sikeston, was a compulsory counterclaim which it failed to assert in a prior suit and is, therefore, barred.

The third ground of the defendant's motion for a summary judgment is not valid. In *Mercoid Corp. v. Mid-Continent Co.*, 320 U.S. 661 (1944), l.c. 671, the Supreme Court held that a private claim for treble damages under Sec. 4 of the Clayton Act, 15 U.S. C.A. 15:

> ". . . is a separate statutory cause of action. The fact that it might have been asserted as a

counterclaim in the prior suit by reason of Rule 13(b) of the Rules of Civil Procedure does not mean that the failure to do so renders the prior judgment res judicata as respects it."

Also see *Switzer Bros. v. Locklin*, 207 F. 2d 483, 488 (C.A. 7, 1953), and *Gasswint v. Clapper*, 17 F.R.D. 309, 313 (D.C. W.D. Mo., 1955).

The plaintiffs attached to their brief in opposition to defendant's motion for summary judgment a number of letters indicating that discounts were given to plaintiffs' competitor but not to the plaintiffs. Therefore, the defendant's second ground for summary judgment fails.

The remaining ground raised by the defendant for summary judgment is that the plaintiffs' claim is barred by the statute of limitations. The acts the plaintiffs allege are in violation of Title 15, U.S.C. Sec. 13 occurred between October 23, 1957, through and inclusive of August 1959. Under Title 15, U. S.C. Sec. 15(b), there is a four-year statute of limitations for this type of action, therefore, in September 1963 the statute of limitations would have run. The plaintiffs did not get service of process over the defendant until January 17, 1964. The plaintiffs filed their complaint on October 23, 1961, which is a commencement of their law suit under 15 U.S.C. Sec. 15(b). See *Goldlawr v. Heiman*, 369 U.S. 463 (1962).

The question remaining for this Court to decide is whether the plaintiffs used due diligence in obtaining service of process over the defendant corporation.

The plaintiffs attempted to get service of process over the defendant corporation by serving Mr. E. O. Beckwith, the vice-president of defendant corporation, while he was in Cape Girardeau temporarily on October 23, 1961. This service of process was quashed by this Court on May 4, 1962, and no attempt was made after May 4, 1962, to obtain service of process over the defendant corporation until January 17, 1964.

The only excuse the plaintiffs can give for the delay is that the original counsel for plaintiffs was not familiar with the special venue statute applicable to anti-trust actions, namely, Title 15 U.S.C. Sec. 22. Instead of using Title 15 U.S.C. Sec. 22 to obtain service on defendant, which new counsel for defendant used, the original counsel tried to obtain service of process under the general venue statute, namely, Title 28 U.S.C. 1391(c) by personal service on Mr. Beckwith.

This is very similar to *Hixon v. Highsmith*, 147 F. Supp. 801 (D.C. Tenn., 1957). In that case the Court found that the plaintiff did not use dilgence in obtaining service of process over the defendant. There the plaintiff first tried to obtain service of process over defendant by personal service, but defendant was a

nonresident. The plaintiff finally obtained service of process over the defendant ten months after the filing of the complaint.

The fact that this present case is an antitrust case could be argued makes a difference, but an attorney who files an antitrust suit under Title 15, U.S.C. Sec. 13 for treble damages should know of the special venue statute under Title 15 U.S.C. Sec. 22 and to claim ignorance of such section it seems to this Court is in itself lack of due diligence on the part of the plaintiffs' original attorney in obtaining service of process over the defendant corporation.

Also the plaintiffs' original counsel did not try to obtain service on defendant foreign corporation by serving the Secretary of State under R.S. Mo. Sec. 351.630, which is permitted under F.R.C.P., Rule 4. There might have been a question as to whether defendant foreign corporation's activities in the State of Missouri constituted doing business in Missouri, but the fact still remains that the plaintiffs' original counsel did not try to obtain service on the defendant corporation through the Missouri Secretary of State.

This Court will enter an order granting the defendant's motion for summary judgment on the ground that the plaintiffs' claim is barred by the statute of limitations. The plaintiff's original attorney did not use due diligence in obtaining service of

process over the defendant corporation after filing the plaintiffs' claim, therefore, the filing of the claim did not toll the statute of limitations.

Dated this 29th day of October, 1964.

/s/ James H. Meredith

United States District Judge

ORDER

(Filed October 30, 1964)

This matter is pending before this Court on defendant's motion for summary judgment. A memorandum filed this day is incorporated by reference and made a part of this order.

IT IS HEREBY ORDERED that the defendant's motion for summary judgment be and the same is hereby granted.

IT IS FURTHER ORDERED that the plaintiffs' claim be and the same is dismissed with prejudice.

Dated this 29th day of October, 1964.

James H. Meredith
United States District Judge

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 17,942.

The Moore Company of Sikeston, Missouri, a Corporation, and J. E. Moore, Jr.,
Appellants,
v.
Sid Richardson Carbon & Gasoline Company, a Corporation,
Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[July 13, 1965.]

Before Van Oosterhout, Blackmun and Mehaffy, Circuit Judges.

Van Oosterhout, Circuit Judge.

This is an appeal by plaintiffs, The Moore Company of Sikeston, Missouri, and J. E. Moore, Jr., from final judgment dismissing their complaint based upon alleged violations of the Robinson-Patman Act and the Clayton Act by defendant Sid Richardson Carbon & Gasoline Company. The court sustained defendant's motion for summary judgment upon the ground that the action was barred by the four-year statute of limitations prescribed by 15 U.S.C.A. § 15b[1]. The trial court's memorandum opinion setting forth the reasons why it considered plaintiffs' cause of action barred by limitation is reported at 237 F. Supp. 817.

We are not here concerned with the merits of plaintiffs' action. The action covers the period from October 23, 1957 (four years prior to the filing date of the complaint) to September 1, 1959. The complaint was filed on October 23, 1961. Summons was promptly issued and service was made on the same day upon a vice president of the defendant in Missouri. Defendant's motion to quash service upon the ground that the officer served was in Missouri only for the purpose of appearing as a witness in an action pending between defendant and plaintiff was sustained on May 12, 1962. Defendant's motion to dismiss for lack of jurisdiction was overruled.

---

[1] 15 U.S.C.A. §15b provides: "Any action to enforce any cause of action under sections 15 or 15a of this title shall be forever barred unless commenced within four years after the cause of action accrued . . ."

On September 14, 1963, Judge Harper on his own motion dismissed the complaint for want of prosecution. Thereupon plaintiffs employed their present counsel. On September 24, 1963, motion to vacate order of dismissal was filed. Defendant having obtained leave, filed brief amicus curiae resisting the motion.[3]

On December 13, 1963, Judge Harper sustained plaintiffs' motion to set aside the order of dismissal. The action was reinstated. No attack is here made upon the reinstatement order.

On January 10, 1964, Judge Harper granted plaintiffs leave to amend the complaint. The amendment did not change the basic cause of action. On January 13, 1964, plaintiffs filed amended complaint. Process issued which was served upon the defendant in Texas on January 17, 1964. Defendant appeared and filed answer raising various defenses including the statute of limitations defense under 15 U.S.C.A. § 15b. Extensive discovery proceedings were conducted by both parties. On September 28, 1964, defendant filed motion for summary judgment including the ground "that the action is barred by the stat-

[3] It appears from the briefs filed that plaintiffs' prior counsel had inadvertently overlooked the fact that jurisdiction could be obtained in this action over the defendant corporation by service in Texas by reason of the provisions of 15 U.S.C.A. § 22. The question discussed in the briefs before the trial court was whether lack of knowledge of such law constituted such lack of diligence in prosecuting the action as to warrant dismissal.

ute of limitation because the statute is not tolled merely by commencing an action, but requires also reasonable diligence in obtaining valid service and plaintiffs here failed to exhibit same; . . ."

Judge Meredith, to whom upon rotation this case had been assigned, sustained the motion upon the ground just set out and dismissed the complaint. The trial court in its opinion conceded that the filing of the complaint constituted a commencement of the action. The court further held that plaintiffs had the additional burden of establishing due diligence in the service of process and that such burden had not been met.

The dispositive legal issue presented by this appeal is whether the filing of the complaint in this federal antitrust case is without more a commencement of the action sufficient to toll the applicable federal statute of limitations, 15 U.S.C.A. § 15b. It is defendant's contention, supported by the trial court and disputed by the plaintiffs, that in addition to the filing of the complaint, reasonable diligence in obtaining service of process is required to toll the statute.

We note that this cause of action was created by federal statutes and that a federal statute of limitations applies. Therefore, federal law controls in determining whether the action was properly commenced. See *Hanna v. Plumer*, . . . U.S. . . . (33 LW 4331); *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 533.

Section 15b clearly bars action not commenced within four years after the cause of action accrues. The alleged violations all took place prior to September 1, 1959. Hence, if the action was not commenced prior to 1964, the year of valid service, the cause of action would be barred by § 15b.

We hold that in a case such as this, based upon federal law and controlled by federal statute of limitation, that the commencement of the action in and of itself is sufficient to toll the statute. Federal Rule of Civil Procedure 3 reads: "A civil action is commenced by filing a complaint with the court." Such rule in our view unmistakedly states in plain, clear, well-understood and unambiguous language that an action is commenced by filing the complaint. The rule sets forth no additional requirements or conditions. The history of the promulgation of the rule is set out by Judge Medina in *Messenger v. United States*, 2 Cir., 231 F. 2d 328. As there shown, suggestions were made that the action abate if jurisdiction by service of process was not obtained within sixty days. Judge Medina in viewing the history of the rule, states:

"In the end, however, no time was specified for the service of process, the Advisory Committee noting that the motion sanctioned by Rule 41(b) provided 'a method available to attack unreasonable delay in prosecuting an action after it has been commenced.' See Report of the Ad-

visory Committee Containing Proposed Rules of Civil Procedure, p. 4 (April, 1937)." 231 F. 2d 328, 329.

See *Rollins v. United States*, 9 Cir., 286 F. 2d 761.

It appears to us that Rule 41(b) provides adequate protection against unreasonable delay in serving process or in prosecuting the suit.

If Rule 3 is read in connection with other rules, no support is found for defendant's position. Rule 4(a) makes it the duty of the clerk to issue summons forthwith after the filing of the complaint and to deliver process to the marshal for service. Rule 4(c) provides for service by the marshal. Thus the duties with respect to obtaining service are placed upon federal officials, not upon the plaintiff. The Rules Committee apparently believing that so placing the burden was of some significance in upholding the validity of the rules states in its notes:

> "When a federal or state statute of limitations is pleaded as a defense, a question may arise under this rule whether the mere filing of the complaint stops the running of the statute, or whether any further step is required, such as, service of the summons and complaint or their delivery to the marshal for service. The answer to this question may depend on whether it is competent for the Supreme Court, exercising the power to make

rules of procedure without affecting substantive rights, to vary the operation of statutes of limitations. The requirement of Rule 4(a) that the clerk shall forthwith issue the summons and deliver it to the marshal for service will reduce the chances of such a question arising. Original Committee Note of 1937 to Rule 3, 2 Moore, Federal Practice § 3.01[2]."

There can no longer be any serious question as to the validity of the rules of civil procedure. See *Hanna v. Plumer*, supra.

There is some support for defendant's position in the federal cases. Prior to the adoption of the Rules of Civil Procedure, federal courts held that an action in equity was commenced for the purpose of tolling the statute of limitations by the filing of the complaint with intent to prosecute the suit diligently, provided reasonable diligence was shown in obtaining service of process. See *Linn & Lane Timber Co. v. United States*, 236 U.S. 574, 578; *United States v. Hardy*, 4 Cir., 74 F. 2d 841, 842; 1 Barron & Holtzoff, Federal Practice & Procedure § 163. A number of states make diligence in obtaining service a requisite for the purpose of tolling their statutes of limitations.

Some cases decided subsequent to the adoption of the Rules have retained the pre-rule view that due diligence in obtaining service is necessary in order to

toll the statute of limitations. See *Hixson v. Highsmith*, E.D. Tenn., 147 F. Supp. 801; *International Pulp Equip. Co. v. St. Regis Kraft Co.*, 55 F. Supp. 860.

Another line of cases holds that it is the filing of the complaint when followed by the lodging of the writ with the marshal that tolls the statute of limitations. See *Mohler v. Miller*, 6 Cir., 235 F. 2d 153; *Hukill v. Pacific & Arctic R. R. & Nav. Co.*, D. Ala., 159 F. Supp. 571. Such result is reached by construing the rules together, more particularly by considering Rule 4(a) in conjunction with Rule 3. As heretofore pointed out, the rules place the obligation for the issuance and service of the summons upon public officials. In our present case, the summons was in fact promptly issued and delivered to the marshal and service was promptly attempted, which subsequently proved to be invalid. There is no evidence of any affirmative action upon the part of the plaintiffs to obstruct the officers in the performance of the duties imposed upon them by Rule 4. Moreover, there has been no unreasonable delay in this case at least subsequent to the time when the dismissal for want of prosecution was set aside.

Substantial support is found in the decided federal cases for the position that the filing of the complaint is a commencement of the action for statute of limitations purposes. "A civil action is commenced and the running of the statute of limitations thereby in-

terrupted by 'filing a complaint with the court.' . . . It is clear that nothing more is required. The phrase 'filing a complaint' as used in Rule 3, means nothing more than delivery of the complaint to the officer of the court authorized to receive it. . . ." *Robinson v. Waterman S. S. Co.*, D.N.J., 7 F.R.D. 51, 54. See *Hoffman v. Halden*, 9 Cir., 268 F. 2d 280, 302; *Huffmaster v. United States*, N.D. Calif., 186 F. Supp. 120; *Gallagher v. Carroll*, E.D. N.Y., 27 F. Supp. 568. These decisions proceed on the theory that the only diligence required by the Rules is the filing of the complaint—that the issuance of and service of the summons are ministerial acts to be performed by the clerk and the marshal rather than placing the burden on the party plaintiff. See *Gallagher v. Carroll*, supra.

In *Hoffman v. Halden*, 9 Cir., 268 F. 2d 280, 302, the court states:

> "The filing of the complaint in the district court tolls the statute of limitations where the action is to enforce as here, a federally created right. *Bomar v. Keyes*, 2 Cir., 1947, 162 F. 2d 136, 141. See, *Ragan v. Merchants Transfer & Warehouse Co.*, 1949, 337 U.S. 530, 533, 69 S.Ct. 1233, 93 L.Ed. 1520; cf. *Mohler v. Miller*, 6 Cir., 1956, 235 F. 2d 153."

Goldlawr, Inc. v. Heiman, 369 U.S. 463, involves an antitrust action brought in a court lacking venue. The court, after holding that 28 U.S.C.A. § 1406(a)

is broad enough to authorize the transfer of cases whether the court in which it was filed had jurisdiction over the defendants or not, states at p. 466:

"When a lawsuit is filed, that filing shows a desire on the part of the plaintiff to begin his case and thereby toll whatever statutes of limitation would otherwise apply. *The filing itself shows the proper diligence on the part of the plaintiff which such statutes of limitations were intended to insure.* . . . It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." (Emphasis added.)

While the Court did not have squarely before it the issue now confronting us, the emphasized language in the foregoing quotation reflects the view of the Court that the filing of the complaint without more constitutes the commencement of an action.

In *Burnett v. New York Central A. R.*, 380 U.S. 424 (April 5, 1965), the Supreme Court held an FELA action was not barred by limitation. In the opinion, the Court cites and relies upon *Goldlawr* and states:

"Congress thereby recognized that the filing of a lawsuit 'itself shows the proper diligence on the part of the plaintiff which . . . statutes of limita-

tion were intended to insure. If by reason of the uncertainties of proper venue a mistake is made . . . "the interest of justice" may require that the complaint . . . be transferred in order that the plaintiff not be penalized by . . . "time-consuming and justice - defeating technicalities." ' "

We find nothing in § 15b which points to any different result.

Recently, the Supreme Court has enunciated the test to be used in determining whether, under a given set of facts, a statute of limitations is to be tolled: "[T]he basis inquiry is whether congressional purpose is effectuated by tolling the statute of limitations in given circumstances." *Burnett v. New York Central R. R.*, supra; see *Minnesota Mining & Mfg. Co. v. New Jersey Wood Finishing Co.*, 33 L.W. 4481, 4484. The legislative history of 15 U.S.C.A. § 15b indicates that Congress intended to require only the filing of a complaint to toll the running of the statute:

> "The present bill would assure all plaintiffs of at least 4 years from the time their cause of action accrued in which to institute suit. It would also guarantee every plaintiff at least a year from the close of a Government antitrust suit to prepare his case and file his complaint." 1955, U.S. Code Cong. & Ad. News p. 2333.

Section 15b was enacted subsequent to the adoption of the Rules. Thus, with knowledge that Rule 3 required only the filing of a complaint to commence an action, had Congress desired any additional steps to be taken they would have enumerated them. However, an adequate remedy for a party, such as the plaintiffs in the instant case, when due diligence is not exercised in properly serving a defendant with a summons, is available under Rule 41(b).

The plain unambiguous language of Rule 3 and § 15b supported by legislative history and the court decisions previously discussed, leads us to the conclusion that under the facts of our present case the applicable statute of limitations is tolled by the filing of the complaint. No reasonable basis exists for engrafting upon the rule or statute a condition that summons be served with diligence. If Congress or the rule makers had intended to impose such condition, it would have been a simple matter to include the condition by appropriate language in the rule or the statute. As heretofore pointed out, the Rules Committee deliberately chose not to impose any such condition.

The trial court erred in holding that diligence in serving process was reqired to toll the statute of limitations. Since diligence in serving process is not a material issue in this case, we do not reach the question of whether under the present record the court would be justified in finding a lack of diligence

in this respect. The court had no Rule 41(b) motion before it and hence the issue of diligence under the law as we have interpreted it is not in the case.

The judgment dismissing the complaint is reversed. This case is remanded to the trial court for further proceedings consistent with the views expressed in this opinion.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

September Term, 1964.

No. 17942

The Moore Company of Sikeston, Missouri, a corporation, and J. E. Moore, Jr.,

Appellants,

vs.

Sid Richardson Carbon & Gasoline Company, a Corporation

Appeal from the United States District Court for the Eastern District of Missouri.

Petition of appellee for rehearing in this cause having been considered, it is now here ordered by this Court that the same be, and it is hereby denied.

August 12, 1965.